No. 3321

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. L. SABIN, trustee in Bankruptcy of the Estate of L. Judkis, Bankrupt, Appellant,

vs.

H. HORENSTEIN, Respondent.

BRIEF OF APPELLEE

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BEATTIE & HOFMANN, INC. 204 STARK STREET

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STATEMENTS OF FACTS. see page

I.

OREGON BULK SALES ACT.

The act in question is entitled, "An Act to Regulate the Purchase, Sale and Transfer of Stocks of Goods, Wares and Merchandise in Bulk," as amended by the General Laws of Oregon, 1913, page 538. Section 6069 L. O. L. is as follows.

"Sec. 6069—Purchaser Must Demand Certificate from Vendor in What Case.—It shall be the duty of every person who shall bargain for or purchase any goods, wares or merchan-

dise in bulk or all or substantially all of the fixtures or equipment, * * * for cash or on credit, to demand and receive from the vendor thereof * * * a written statement" and makes it the duty of the vendor to furnish such statement under oath.

Section 6072 L. O. L., as amended by the General Laws of Oregon 1913, page 539 is as follows:

"Sec. 6072. What Deemed a Sale in Bulk. —Any sale or transfer of goods, wares or merchandise or all or substantially all of the fixtures or equipment * * * * out of the usual or ordinary course of the business or trade of the VENDOR or whenever thereby substantially the entire business or trade theretofore conducted by the Vendor shall be sold or conveyed or attempted to be sold or conveyed * * * * , shall be deemed a sale or transfer in bulk in contemplation of this act; * * * * "

II.

The right and remedy of the creditors under the bulk sales act are not different from the right and remedy of any other creditor whose debtor has disposed of his property in fraud of his creditors.

Kasper v. Cohen, 151 Pac. 800-801.
(Involving Washington Sales in Bulk Act, which is the same as Oregon Act.)

III.

To avoid a transfer under Sec. 67e of Bankruptcy Act it is incumbent upon complainant

to show actual fraud in the conveyance.

Coder v. Arts, 213 U. S. 223-242.

VI.

A transfer beyond or within the four months immediately preceding the filing of a petition in bankruptcy by or against a debtor is not sufficient to establish actual fraud in fact or an intent on his part or on the part of the person receiving the property, to hinder, delay or defraud other creditors.

Coder v. Arts, 152 Federal 943-947.

Meservey v. Roby et al, 198 Fed. 844.

V.

The law leans to the side of innocence and fraud will not be presumed and the burden is on the party charging fraud.

Shera v. Merchants' Life Ins. Co., Federal 484-486.

IV.

When the court has considered conflicting evidence and made a finding or decree it is presumptively correct and unless some obvious error of law has intervened or some serious mistake of fact has been made the finding or decree must be permitted to stand.
of fact has been made the finding or decree must be permitted to stand.

Coder v. Arts, 152 Federal 943-946.

Statement of Facts

This is a suit brought by R. L. Sabin, a trustee in bankruptcy of the estate of L. Judkis, to recover the value of goods alleged to have been purchased by Defendant Horenstein of the bankrupt Judkis between July 1st, 1917 and October 31, 1917, out of the usual or ordinary course of the business or trade of said bankrupt, without first complying with the requirements of the Oregon "Sales in Bulk Act." (Transcript, pp. 2 to 6 inclusive.) The contention of plaintiff is denied by defendant who affirmatively alleges, that during the time covered by plaintiff's complaint, and long prior thereto, the bankrupt was engaged in and carried on a wholesale and retail mercantile business, and that all the goods purchased by defendant were purchased in the usual, customary and ordinary course of the business or trade of said bankrupt. (Transcript, pp. 7 to 8 inclusive.)

Upon the issue thus joined the cause was tried before the Honorable Charles E. Wolverton, United States District Judge, and the following facts established:

That during the year 1913, L. Judkis and another engaged in the mercantile business in Portland, Oregon, and said partnership continued for seven to nine months. Upon dissolution of said partnership, said Judkis continued the business under the name of "American Clothing Company," up and until the bankrupt proceedings against Judkis the latter part of 1917 . (Transcript p. 22.)

During all of said time a retail and wholesale business was carried on by said partner-

ship and "American Clothing Company," and merchandise sold at wholesale to the defendant Horenstein as well as numerous other merchants. (Transcript, pp. 12 to 14 inclusive; pp. 22 to 27 inclusive; pp. 44, 48, 50, 51, 52, 55 and 56.)

From time to time and in various amounts ranging from $6.00 to $225.00, during the months of July, August, September and October 1917, Defendant Horenstein purchased of Judkis and paid for about $1,000.00 worth of merchandise; included in said sum were purchases at retail amounting to about $180.00 (Transcript pp. 23 to 28) which said purchases were made without comply with requirements of the Oregon "Sales in Bulk Act."

The largest purchase made by Defendant Horenstein during said period of time was 36 pairs of shoes, for which he paid $225.00—invoice price less freight. This being the only transaction in so far as is disclosed by the record upon which the bankrupt Judkis did not make a profit. Defendant Horenstein, in turn, sold said shoes at a profit of about $8.00.

Among the other goods purchased at wholesale during the said period by the defendant were 5 raincoats at $5.00 each—6 raincoats at $5.00 each—10 pairs corduroy pants at $1.75 each—14 pairs corduroy pants at $1.90 each—6 dozen aprons at $6.00 per dozen—6 pairs of top shoes—4 dozen cotton pants at $19.00—2 dozen overalls and 2 dozen jumpers at $10.00 a dozen.

The defendant Horenstein was engaged in the barber business, had a supply store and used to have two stores. He had purchased

goods at wholesale from merchants other than Judkis and also purchased bankrupt stocks. On one occasion he purchased from Judkis a bankrupt stock which plaintiff sold to Judkis.

L. Judkis was adjudged a bankrupt in December, 1917, and thereafter R. L. Sabin was appointed trustee of said estate. The assets of said estate were not sufficient to pay the creditors in full. The Court thereupon rendered its opinion, which is in part, as follows:

OPINION OF THE COURT.

WOLVERTON, District Judge.

This is an action by R. L. Sabin, Trustee in Bankruptcy of the estate of L. Judkis, plaintiff, against H. Horenstein, defendant. The action is based upon the statute which is designed to prohibit the sale of merchandise stocks in bulk. The statute itself provides that it shall be the duty of every person who shall bargain for, or purchase goods in bulk to require of the vendor a statement of the goods, containing the purchase price, and this statement is to be under oath. Then it devolves upon the purchaser to notify the creditors of the vendor of the proposed sale, in order that the creditors may be warned or advised of what is going to take place, so that if necessary they can protect themselves.

The term "sales in bulk" is defined by Section 6072, and, so far as it applies to this case, the definition is this:

"Any sale or transfer of goods, wares or merchandise, * * * * out of the usual or ordinary course of the business or trade of the

vendor, or whenever thereby substantially the entire business or trade theretofore conducted by the vendor shall be sold or conveyed or attempted to be sold or conveyed to one or more persons."

It seems to me that the spirit of this statute is to prevent persons who are dealing in merchandise from disposing of their entire stock, or of the larger proportion of it, or of such a proportion of it as will render the vendor less able to pay his obligations. I do not think it applies to small sales in bulk, or to sales that do not materially affect the vendor's solvency, if I may put it in that way. That interpretation of the statute appears from the statute itself in reading further as to the definition of sales in bulk. The statute says: "Any sale or transfer of goods, wares or merchandise, or all or substantially all of the fixtures or equipment used, or to be used in the sale, display, manufacture, care or delivery of said goods," etc., and then it says, "out of the usual or ordinary course of the business or trade of the vendor, or whenever thereby substantially the entire business or trade" is to be disposed of.

So that the sale in bulk must be read with reference to each particular business, and it must be such a sale as will indicate that the vendor is intending to dispose of his entire business, or practically the entire business, or such a proportion thereof as will impair his solveny, and render him unable to pay his debts in the usual course.

I will say further that, where a sale in bulk is made within the provisions of the statute, that sale is conclusively presumed fraudulent and void. So, therefore, where a sale in bulk

is made I presume suit will lie to recover back the goods that have been purchased, where the vendee is aware of the conditions under which he is purchasing.

In this case, the attempt is not to recover back the goods, but to recover the value of the goods which the vendee has purchased. I presume that may be resorted to where the vendee has parted with the goods that he has purchased.

Now, in the present case Judkis was doing business for himself for several years—I think from 1914—and he says that he was doing **both a retail and jobbing business.** That is his testimony, or the effect of it.

It has been shown that he has on numerous occasions sold goods in jubbing lots. Some eight or ten witnesses have appeared upon the stand here who testify that they have so purchased from him. These purchases have extended back for some period. The bulk of the purchases were made, I think, within the last three or four months of the time in which Judkis was in business; but it is evidence of the fact of the manner of his doing business. **These individuals who testified to their purchases in jobbing lots have not only testified that they have purchased in one lot, but they have purchased more than one lot. They have made purchases from time to time as high as eight or ten or more.** Take the defendant in this case. He testifies that he purchased from time to time different job lots of Judkis, and he has brought here as testimony of the fact the checks that he has issued in payment of the goods. Mr. Solomon was called as a witness here, and he also produced checks show-

ing that he had half a dozen or more transactions with Judkis in which he made purchases in job lots, and these checks are evidence of that fact. So it is with other witnesses. **When we put this testimony all together, we find that there are numerous instances in which purchases have been made in job lots. This is evidentiary of the fact which the defendant claims, that Judkis was doing a jobbing business as well as a retail business.**

It is said that this testimony is not reliable, but that cannot affect this case very materially, because there is no evidence, practically, to the contrary, and the Court must rely upon this testimony for its decision, or this kind of testimony. * * * * But upon the whole, the Court cannot say but what Judkis, as he claims, and as the defendant claims, **was doing, not only a retail business, but a jobbing business at the same time,** although in an irregular way. These people down there are seemingly out of touch with the regular way of doing business by the regular merchants; but the unusual way, by persistence in it, may become the usual way. **So in this case, Judkis, in selling in job lots, was selling in the usual way according to his own business transactions and his own business methods.**

I can see no other conclusion under the testimony in this case, and the complaint will be dismissed.

Whereupon a decree was duly and regularly entered dismissing the complaint, from which decree this appeal was taken.

AUTHORITIES

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After a careful consideration of appellants' brief in this case and separating the wheat from the chaff we have concluded that the only point necessary to be discussed is: What was the usual or ordinary course of the business or trade of the vendor L. Judkis, or in other words was Judkis, the vendor, engaged in a wholesale or jobbing, as well as a reetail business?

ARGUMENT.

The construction placed upon the statute by the Honorable Chas. E. Wolverton, is in our opinion the proper and only logical construction thereof and as far as we have been able to discover, after diligent search, there is no recorded case where said statutes or similar ones have been brought into play under circumstances calling for the construction contended for by plaintiff in this suit, but, be that as it may, we will discuss the case from plaintiff's view point and under the strained construction therein contended for, namely: That irrespective of all else, any sale of merchandise whether it be large or ever so small, out of the usual or ordinary course of the business or trade of the vendor, comes within the act.

It must be conceded, in view of the testimony of plaintiff's witnesses, that if Mr. Judkis was selling goods at wholesale as well as retail, the transactions between Judkis and Horenstein involved herein, were in the usual or ordinary course of Judkis' business. (Transcript—Judkis—page 23; Ballin—page 30; Boscowitz—page 34; Bamford—page 37; Hammond—page 40.) The only question, therefore, is, was

the vendor Judkis doing a wholesale as well as retail business?

It is conceded that defendant purchased from time to time, during July, August, September and October of 1917 about $1,000.00 worth of merchandise, all of which, except about $180.00 worth, was purchased of Mr. Judkis at wholesale in amounts ranging from about $6.00 to $225. Plaintiff contended that Judkis was doing a retail business only; that the goods having been disposed of at wholesale were sold out of the usual or ordinary course of the business of Judkis and therefore said transactions were within the Bulk Sales Act, despite the fact that the total of said sales neither amounted to a transfer of the entire stock or anywhere near the larger proportion thereof.

Testimony relative to the nature of Judkis' business being as follows:

PLAINTIFF'S WITNESSES.

L. JUDKIS—(A witness for plaintiff, attorneys for plaintiff's statement on page 23 of appellant's brief to the contrary notwithstanding)—testified:

That he had been in business for about 5 years in Portland, Oregon, and during all of said time he did a retail and a little jobbing or wholesale business. (Transcript page 22.) That he sold goods at wholesale from the time he first started in business. (Transcript page 22 and 27), and "That during the time he was in business he sold goods in bulk (meaning wholesale—Transcript page 22-23) to lots of people besides Horenstein. That the goods sold

to defendant were sold in the way he had been doing business. (Transcript page 23.)

JACOB H. BALLIN testified:

That he called at Mr. Judkis' store on various occasions as a salesman and that he was competent to state, from observation, the character of business conducted by Judkis and that Mr. Judkis was "In the Retail Gents' Furnishings and Clothing Line" (Transcript page 29.) He had never purchased goods of Judkis and did not know whether or not Judkis sold goods at wholesale (Transcript page 30). This witness' correctness of observation and how intimately he was acquainted with Mr. Judkis' business is evidenced by the fact that he did not remember Judkis carrying a line of Women's Clothing (Transcript page 31) although Judkis had such a line of merchandise (Transcript pages 24, 53, 55).

ANSELM BOSCOWITZ, who visited Mr. Judkis' place of business, as a salesman, testified:

That Judkis was doing a retail business. He did not know that Judkis had been selling goods at wholesale. That in the rear of the store was a room that Mr. Judkis could use for wholesale purposes. That at times he saw large quantities of merchandise which Mr. Judkis could have jobbed off and which Judkis told him he did job off. That he knew of Mr. Judkis jobbing off some "underwear" and some "Buster Brown Hosiery" (Transcript p. 31-35).

JAMES A. BAMFORD, a salesman, testified:

That he had been selling Judkis goods for

three years and that the business conducted by Judkis was that of a retail store, as far as his knowledge was concerned. That he could not state of his own personal knowledge, whether or not Judkis conducted a wholesale in connection with his retail business. That he could only say that Mr. Judkis' place was equipped as a retail store. He had seen him retail goods and had never seen any jobbing done there. (Transcript pp. 35-36).

WINTHROP HAMMOND, upon being shown a list of the creditors of Judkis stated that it would indicate that Mr. Judkis was doing a retail business (Transcript page 38); that he had no personal knowledge of Judkis and never heard of him or of his business. That it might be possible for a man to carry on a small wholesale business in connection with retail. That from the few names he was familiar with appearing on the said list, he would say that the list did not contain the names of firms that sell to wholesalers. That he was familiar with a dozen names on the list who sell to retail trade, and didn't think they sold to wholesalers, but was not familiar with the rest (Transcript pages 38-40).

DEFENDANT'S WITNESSES.

J. SOLOMON, a merchant in Portland, Oregon, for 29 years, carrying a stock worth between $30,000.00 and $40,000.00, testified:

He had purchased merchandise of Judkis "off and on since he was in business for the last three or four years, from $150, $200 to $300 at a time." (Transcript page 43.) That he bought the goods at wholesale and "that Judkis conducted a wholesale and retail business." "He knew Judkis sold goods to other

merchants at wholesale; that the transactions between himself and Judkis were frequent." That there was nothing unusual in Judkis' selling goods at wholesale or in the sales to defendant. (Transcript page 44.)

LOUIS KRAUSE, a merchant in business in Portland, Oregon, for 21 years, carrying a stock varying, according to the season, from $12,000 to $20,000, testified:

He had known and had business dealings with Judkis for about two years during which time he purchased goods at wholesale of Judkis in various amounts from $150 to $200 at a time, aggregating more than $1,000. "That Judkis was doing a jobbing business, and had a retail store in connection therewith." That there was nothing unusual in the Judkis sales to defendant. (Transcript pp. 47-48.)

MEYER WAX, engaged in the general merchandise business in Portland, Oregon, for 22 years, testified:

That he had known and had business dealings with Judkis for about three years; that some of the goods he purchased were delivered from the Judkis store and some from his warehouse; that "Judkis was engaged in the retail and partly wholesale"; that purchases he made from Judkis were in the usual course of business in lots of about $125. (Transcript pp. 49-50.)

L. ROBINSON, a merchant, engaged in the dry goods and gents furnishing business in Portland, Oregon, for some 22 years, testified:

That he had purchased merchandist from

Judkis for the past 3 or 4 years in quantities from $10 to $30 at a time and "paid wholesale prices for the same." That "Judkis was in the wholesale and retail business" and "that the sale to Horenstein of 36 pairs of shoes was not out of the ordinary course of business." (Transcript, page 51.)

DEFENDANT HORENSTEIN testified:

That he had had business dealings with Judkis for about 4 or 5 years and frequently purchased goods from him at wholesale and retail and said purchases were paid for and were made in the usual course of business. That he purchased goods at wholesale from merchants other than Judkis. (Transcript, page 54.)

M. GLICKMAN, a merchant, conducting a wholesale and retail business with a stock of about $15,000 to $20,000 and who had been in business in Portland, Oregon, for the last 15 years, testified:

That he had known Judkis for 4 or 5 years and that Judkis "used to sell retail, some wholesale, same as we did." (Transcript, page 55.)

M. COHEN, a merchant engaged in the retail and wholesale business in Portland, Oregon, for 10 years, testified:

"That he was acquainted with Mr. Judkis and knew the kind of business that Judkis was conducting. That he bought goods of Judkis at wholesale. Judkis was selling wholesale and retail." (Transcript, page 56.)

The one transaction upon which appellant is laying great stress and around which he is now trying to build his case is the sale of 36 pairs of shoes to Horenstein for invoice price —Judkis losing the freight, claiming said transaction to be so unusual as to put a purchaser upon notice.

The testimony in that regard being as follows, i. e.:

PLAINTIFF'S WITNESSES

BOSCOWITZ, referring to such a sale made by a **retail merchant,** said:

"A. I would state in the matter of the shoe transaction, you put the example before me, providing the jobber or manufacturer didn't give the retailer consent to dispose of the shoes, it would be an unusual transaction." (Trans., p. 32.)

BAMFORD:

Q. Supposing the merchandise shipped did not come up to sample, now, rather than send all those goods back and pay freight, wasn't it just as advisable to sell those goods and eliminate freight?

A. I have known a number of instances like that, in which the matter was referred back to the factory and the factory made an allowance on the goods.

Q. Do you know whether or not there was any allowance made by the factory in this case?

A. I do not. . . . .

(Transcript pages 37-38.)

DEFENDANT'S WITNESSES.

SOLOMON testified that when a man gets too much of one article he is willing to sell an amount of it; that he, himself, makes similar sales, sometimes even selling goods for cost and losing the freight; that other stores did likewise and it was customary so to do. "When I have too much of one kind, or odds and ends, I sell it out at cost or below cost * *." (Transcript, p. 44.)

Q. Mo. Solomon, is it out of the ordinary in a case where Mr. Tieser has just stated Mr. Judkis sold 36 odd pairs of shoes to Mr. Horenstein, and has sold them at cost and lost the freight on them, is there anything unusual about that?

A. Nothing unusual.

Q. Do you know, could you tell what reasons people have, merchants have, for doing that?

A. Well, sometimes goods don't come up to sample; sometimes the man has got too much of one article, he orders from different houses, some of the things he wishes to get rid of, and it will pay him to get rid of, instead of having them on the shelf, to lose the freight on them (Transcript p. 46).

KRAUSE testified that if freight had not been paid upon the goods, but they had been

sold for cost less freight, that would not be unusual, but it is very often done by some merchants when they know they are overstocked—when they may use the money for something else. (Transcript p. 49.)

ROBINSON testified "That a sale to Horenstein of 36 pairs of shoes at cost less freight was not out of the ordinary course of business; that it was usually done every day in the week." (Transcript p. 51.)

GLOCKMAN testified "It was usual to sell merchandise and lose the freight, and many do that and even discount 10 or 15 percent in order to get rid of stock they couldn't use." (Transcript 55.)

Defendant Horenstein sold said shoes at a profit of about $8.00.

Considering this evidence, bearing in mind that the burden was upon the plaintiff, that the court found that Judkis was doing a jobbing or wholesale business as well as a retail business, and the rule that when the court has considered conflicting evidence and made a finding or decree it is presumptively correct and must be permitted to stand unless some obvious error of law or serious mistake of fact has been made, we respectfully submit that the decree of the lower court should be affirmed.

Respectfully submitted,

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